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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 IN RE SUNPOWER SECURITIES
14 LITIGATION

Case No. CV 09-5473-RS (JSC)
(Consolidated)

15 **CLASS ACTION**

16 **REQUEST FOR JUDICIAL
NOTICE FILED IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS REGARDING
FORWARD-LOOKING
STATEMENTS AND VAGUE
STATEMENTS OF CORPORATE
OPTIMISM**

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21 Judge: Hon. Richard Seeborg
22 Courtroom: 3, 17th Floor
Hearing Date: October 25, 2012
23 Hearing Time: 1:30 p.m.
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REQUEST FOR JUDICIAL NOTICE

2 Defendants SunPower Corporation (“SunPower”), Thomas H. Werner, Dennis V. Arriola,
3 and Emmanuel T. Hernandez (collectively, “Defendants”) have filed a Motion for Partial
4 Judgment on the Pleadings Regarding Forward-looking Statements and Vague Statements of
5 Corporate Optimism (“Motion”). In support of their Motion, Defendants request that the Court
6 take judicial notice, under Federal Rule of Evidence 201, of the documents attached as exhibits to
7 the Declaration of Andrew S. Bernick in Support of the Motion (“Bernick Declaration”). The
8 documents attached to the Bernick Declaration include: (1) documents filed with the United
9 States Securities and Exchange Commission (the “SEC”); (2) transcripts of SunPower’s recorded
10 conference calls with investors; and (3) court documents filed in this action.

ARGUMENT

12 Federal Rule of Evidence 201 authorizes a court to take judicial notice of facts that are
13 “not subject to reasonable dispute” and “(1) . . . generally known within the trial court’s territorial
14 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
15 reasonably be questioned.” Fed. R. Evid. 201(b). The contents of each of the exhibits attached to
16 the Bernick Declaration meet these standards.

I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF SUNPOWER'S FILINGS WITH THE SEC.

19 The Court should take judicial notice of the contents of **Exhibits 1, 2, 4, 5, 7, 8, 10, 11,**
20 **13, 14, 16, 17, 19, 20, and 22** to the Bernick Declaration. These exhibits consist of documents
21 that SunPower filed with the SEC. Documents filed with the SEC are matters of public record,
22 and their contents may be judicially noticed. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2
23 (9th Cir. 2006); *In re Silicon Graphics Sec. Litig.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997) (courts
24 may “take judicial notice of the contents of relevant public disclosure documents required to be
25 filed with the SEC as facts capable of accurate and ready determination”); *Brodsky v. Yahoo! Inc.*,
26 630 F. Supp. 2d 1104, 1111 (N.D. Cal. 2009) (“SEC filings may be judicially noticed”); *In re*
27 *CNET Networks, Inc.*, 483 F. Supp. 2d 947, 953-54 (N.D. Cal. 2007) (taking judicial notice of
28 contents of public filings).

1 The Court should consider **Exhibits 1, 2, 4, 5, 7, 8, 10, 11, 13, 14, 17, 20, and 22** to the
 2 Bernick Declaration for the additional reason that those documents contain cautionary language
 3 accompanying forward-looking statements. *See* 15 U.S.C. § 78u-5(e) (“[T]he court shall consider
 4 any statement cited in the complaint and any cautionary statement accompanying . . . forward-
 5 looking statement[s], which are not subject to material dispute, cited by the defendant.”); *Emp’rs*
 6 *Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1133 (9th
 7 Cir. 2004).

8 Further, the Court may consider **Exhibits 2, 4, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19, 20, and**
 9 **22** to the Bernick Declaration regardless of whether it takes judicial notice of the contents of
 10 those documents because they are incorporated by reference into Plaintiffs’ First Amended
 11 Consolidated Class Action Complaint (“FAC”) (Dkt. No. 153), or the FAC necessarily relies on
 12 them. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *In re Versant*
 13 *Object Tech. Corp. Sec. Litig.*, No. C-98-00299-CW, 2000 U.S. Dist. LEXIS 22333, at *8-9
 14 (N.D. Cal. May 18, 2000). Individual paragraphs of the Bernick Declaration indicate which FAC
 15 paragraphs rely on each exhibit.

16 **II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF SUNPOWER’S**
 17 **INVESTOR COMMUNICATIONS.**

18 The Court should also take judicial notice of the contents of the documents attached as
 19 **Exhibits 3, 6, 9, 12, 15, 18, and 21** to the Bernick Declaration. These exhibits consist of
 20 transcripts of SunPower’s recorded conference calls with investors. The contents of the investor
 21 conference calls are “not subject to reasonable dispute” because they can be “accurately and
 22 readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
 23 Evid. 201(b); *Brodsky*, 630 F. Supp. 2d at 1111 (taking judicial notice of the contents of
 24 conference calls with investors); *In re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964,
 25 979-80 (N.D. Cal. 2010) (same).

26 **Exhibit 12** to the Bernick Declaration should also be considered by the Court because it
 27 contains cautionary language accompanying forward-looking statements. *See* 15 U.S.C. § 78u-
 28 5(e); *Clorox*, 353 F.3d at 1133. In addition, **Exhibits 3, 6, 9, 12, 15, 18, and 21** to the Bernick

1 Declaration are cited in the FAC, and the Court may consider them regardless of whether it takes
 2 judicial notice of their contents. *See Tellabs*, 551 U.S. at 322; *Versant*, 2000 U.S. Dist. LEXIS
 3 22333, at *8-9.

4 **III. THE COURT SHOULD TAKE JUDICIAL NOTICE OF DOCUMENTS FILED IN
 5 THIS ACTION.**

6 The Court should also take judicial notice of the contents of the document attached as
 7 **Exhibit 23** to the Bernick Declaration. This exhibit is a copy of a document entitled “Lead
 8 Plaintiffs’ First Request for Production of Documents to Defendants,” filed in this action on
 9 August 30, 2012 as Exhibit 7 to the Declaration of Erik D. Peterson in Support of Plaintiffs’
 10 Motion to Compel Production of Documents Responsive to First Set of Document Requests.
 11 (Dkt. No. 208-7.) It is well established that this Court may take judicial notice of such court
 12 documents. *See, e.g., United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*,
 13 971 F.2d 244, 248 (9th Cir. 1992) (taking judicial notice of court proceedings); *Kootenai Tribe of*
 14 *Idaho v. Veneman*, 313 F.3d 1094, 1124 n.29 (9th Cir. 2002) *abrogated on other grounds* 630
 15 F.3d 1173 (9th Cir. 2011) (taking judicial notice of a complaint filed in another action).

16 **CONCLUSION**

17 For the foregoing reasons, Defendants respectfully request that the Court take judicial
 18 notice of the contents of the documents attached as **Exhibits 1 through 23** to the Bernick
 19 Declaration.

20 Dated: September 14, 2012

21 MORRISON & FOERSTER LLP

22 By: /s/ Judson E. Lobdell
 23 Judson E. Lobdell

24 Attorneys for Defendants
 25 SUNPOWER CORPORATION, THOMAS H. WERNER,
 DENNIS V. ARRIOLA, and EMMANUEL T.
 26 HERNANDEZ

1 **ECF ATTESTATION**

2 I, Andrew S. Bernick, am the ECF User whose ID and Password are being used to file the
3 foregoing document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Judson E.
4 Lobdell has concurred in this filing.

5 Dated: September 14, 2012

MORRISON & FOERSTER LLP

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7 By: /s/ Andrew S. Bernick

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